Bug Buster Specialists Sdn Bhd & Ors v Ridpest Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12A-2–01 OF 2015
GUNALAN MUNIANDY JC
15 JULY 2015

Civil Procedure — Pleadings — Writ and statement of claim — Amendment of — Amendment to reduce sum claimed and to alter date of termination of agreement — Whether SCJ erred in decision to allow amendment — Discretion — Whether exercised properly and on correct principles — Whether SCJ failed to adequately consider element of serious prejudice — Whether amendments could be compensated by costs — Whether effect of amendments would be to change character of suit — Whether application to amend was bona fide — Whether appellate intervention necessary

Ridpest Sdn Bhd ('the respondent'), a local company, was at all material times a licensed franchisor of the pest control system known as 'Ridpest'. The respondent entered into a franchise agreement ('FA') with Bug Buster Specialists ('the first appellant'), whereby it granted the latter a franchise to operate in Shah Alam. Under the franchise arrangement the first appellant/franchisee had entered into service contracts for a period ranging from a one-off service to a six year term with end-customers and collected the full payment for the service contracts up front from the end customers. Sometime in March 2013 the FA between the respondent and the first appellant was terminated and the respondent took over the first appellant's service contracts. However, these included numerous service contracts for which the first appellant had collected the payment from the end-customers but service was not completed. The respondent thus filed a suit against the first the appellant and the second and third appellants, who were the guarantors, for the refund of RM729,413, which was the payment collected by the first appellant for services that it had not delivered to the end customers when the service contracts taken over by the respondent. About a week before the trial the respondent applied to amend the writ and statement of claim. The amendments were to reduce the sum claimed from RM729,413.01 to RM697,317.67 and to alter the date of termination of the FA between the parties from 31 July 2012–11 January 2013. The sessions court judge ('the SCJ') found that there was no prejudice to the appellants because of the reduced claim and also that there was no change in the cause of action. As such, he allowed the proposed amendments to the writ. Hence the present appeal.

Held, allowing the appeal with costs of RM7,000:

(1) The SCJ had failed to adequately consider the element of serious prejudice or injustice caused to the appellants by the eleventh hour amendments that could not be compensated by costs when the trial was set to proceed and all documentary evidence required for defence of the claim had been disclosed (see para 10).

(2) The SCJ had also failed to seriously consider whether the effect of the amendments would be to change the character of the suit from one to another. As the issue of the date of the cause of action was crucial in this case for implied breach of the FA, the date of termination of the FA was a most material factor to the claim and the defence raised. As such, the SCJ had clearly erred in principle in his decision to allow the amendments sought, which had the effect of turning the suit from one character to another inconsistent character (see paras 8 & 10–11).

(3) More importantly the SCJ had failed to address the vital issue of bona fide of the application as vital circumstances relating to the application appeared to disclose obvious mala fide on the part of the respondent in moving the court to allow the amendments on vital matters on the day of the trial itself. Thus, while the trail court retained the absolute discretion to allow amendments to pleadings, the discretionary power had to be exercised properly and on correct principles. In the present case, the SCJ had failed to exercise his discretionary powers correctly on established principles and all relevant considerations (see paras 10–12).

[Bahasa Malaysia summary

Ridpest Sdn Bhd ('responden'), adalah syarikat tempatan, pada kesemua masa adalah pemberi francais berlesen sistem kawalan perosak yang dikenali sebagai 'Ridpest'. Responden memasuki perjanjian francais ('PF') dengan Bug Buster Specialists ('perayu pertama'), di mana ia memberikan perayu pertama francais untuk beroperasi di Shah Alam. Di bawah penyusunan francais perayu pertama/francaisi telah memasuki kontrak perkhidmatan bagi tempoh antara perkhidmatan sekali sahaja kepada tempoh enam tahun dengan pelanggan akhir dan mengutip bayaran penuh bagi bayaran bulanan kontrak perkhidmatan pelangan-pelangan akhir. Pada kira-kira dalam bulan Mac 2013 PF di antara responden dan perayu pertama ditamatkan dan responden mengambil alih kontrak perkhidmatan perayu pertama. Walau bagaimanapun, ini termasuk pelbagai kontrak perkhidmatan di mana perayu pertama telah mengutip bayaran daripada pelanggan-pelanggan akhir tetapi perkhidmatan tidak siap. Responden oleh itu memfailkan tindakan terhadap perayu pertama dan perayu kedua dan ketiga, yang mana adalah penjamin-penjamin, bagi pemulangan balik sejumlah RM729,413, yang mana adalah bayaran yang dikutip oleh perayu pertama bagi perkhidmatan yang tidak diberikan kepada pelanggan-pelanggan akhir apabila kontrak perkhidmatan diambil alih oleh

responden. Lebih kurang seminggu sebelum perbicaraan responden memohon untuk meminda writ dan penyataan tuntutan tersebut. Pemindaan adalah untuk mengurangkan jumlah yang dituntut daripada RM729,413.01 kepada RM697,317.67 dan untuk menukar tarikh penamatan PF di antara pihak-pihak dari 31 Julai 2012–11 Januari 2013. Hakim mahkamah sesyen ('HMS') mendapati bahawa tidak terdapat prejudis kepada perayu-perayu atas sebab tuntutan yang dikurangkan dan juga tidak terdapat penukaran dalam kausa tindakan. Oleh itu, beliau membenarkan pemindaan yang dicadangkan kepada writ. Maka rayuan ini.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM7,000:

(1) HMS telah gagal untuk mempertimbangkan secara wajar unsur prejudis serius atau ketidakadilan diakibatkan kepada perayu-perayu akibat pemindaan saat-saat terakhir yang tidak dapat dipampaskan oleh kos apabila perbicaraan ditetapkan untuk diteruskan dan kesemua keterangan dokumentar yang dikehendaki bagi pembelaan tuntutan tersebut didedahkan (lihat perenggan 10).

(2) HMS juga gagal untuk mempertimbangkan secara serius sama ada kesan pemindaan akan menukar sifat tindakan dari satu kepada yang lain. Memandangkan isu tarikh kausa tindakan adalah penting dalam kes ini bagi kemungkiran tersirat PF, tarikh penamatan PF adalah faktor material kepada tuntutan dan pembelaan dibangkitkan. Oleh itu HMS telah dengan jelas pada dasarnya tersilap dalam keputusannya dengan membenarkan pemindaan yang dipohon, yang mana mempunyai kesan menukar tindakan tersebut daripada satu sifat kepada sifat yang lain yang tidak konsisten (lihat perenggan 8 & 10–11).

(3) Lebih penting HMS telah gagal untuk menumpukan perhatian kepada isu penting bona fide permohonan kerana keadaan penting berkaitan permohonan seperti mendedahkan mala fide jelas pihak responden dalam menggerakkan mahkamah untuk membenarkan pemindaan atas perkara penting pada hari perbicaraan itu sendiri. Oleh itu, sementara mahkamah perbicaraan mengekalkan budi bicara mutlak untuk membenarkan pemindaan kepada pliding, kuasa budi bicara perlu dilaksanakan dengan betul dan atas prinsip yang betul. Dalam kes ini, HMS telah gagal untuk melaksanakan kuasa budi bicaranya dengan betul atas prinsip yang ditetapkan dan kesemua pertimbangan relevan (lihat perenggan 10–12).]

Notes

For cases on pleadings in general, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6761–7633.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230, SC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Rules of Court 2012 O 20 r 5(1)

Valerie Chong (Cindy Kiu with her) (Valerie Chong & Co) for the first appellant.
William Foo (Foo Chambers) for the second and third appellant.
Arun Chasi (Esther Ong, Tengku Saiful & Sree) for the respondent.

Gunalan Muniandy JC:

[1] This is an appeal against the decision of the learned sessions court judge ('the SCJ') to allow the application of the respondent/plaintiff in the sessions court ('the SC') to amend the writ and statement of claim ('SOC'). The amendments allowed were to reduce the sum claimed from RM729,413.01 to RM697,317.67 and further to alter the date of termination of the franchise agreement ('FA') between the plaintiff and the first appellant company from 31 July 2012 to 11 January 2013.

BACKGROUND FACTS

[2] The salient facts are, briefly, as summarised in the respondent's submission as follows:

(a) the plaintiff is a local company in the business of pest control services and is a licenced franchisor of its pest control system under the brand name 'Ridpest';

(b) the plaintiff gave a franchise to the first appellant (who was the first defendant in the SC) operate in the area of Shah Alam. The second and third respondents (respectively the second and third defendants in the SC) were guarantors;

(c) the nature of the dealings between the franchisee and the end-customers was such that the franchisee would enter into service contracts with the end customers for a period ranging from one-off service to six year term. As a matter of general system, the franchisee would invoice and collect the full payment for the entire contract upfront;

(d) the franchise agreement between the respondent and the first appellant was terminated on 11 March 2013 (as per the respondent's case) or 15 March 2013 (as per the appellants' case);

(e) at the point of termination there were numerous pending service contracts for which the first appellant had collected the payment from the end customers but service not completed. These service contracts were taken over by the respondent and less need to say, the respondent cannot claim payment therefore once again from the end customers; and

(f) hence the respondent's suit against the first appellant for refund of the payment collected in respect of the services which were not delivered by the first appellant but were taken over by the respondent. The second and third appellants were made parties being guarantors for the first respondent.

The law on amendment of writ and pleadings

[3] Order 20 r 5(1) of the Rules of Court, 2012 ('the ROC') which embodies the general rule on amendment of pleadings lays down that:

> ... the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.

[4] In *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, the Supreme Court, in dealing with the general principles on amendment of pleadings adopted following passage from The Supreme Court Practice (per Abdul Hamid Omar, Acting LP)

> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at p 1231; [1958] 3 All ER 540 at p 546).
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> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in. accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v Smith* (1883) 26 Ch D 700 at pp 710–722, with which observations AL Smith LJ

expressed 'emphatic agreement' in *Shoe Machinery Co v Cultam* [1896] 1 CLJ 108 at p 112). A

[5] In the landmark Federal Court case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 the test to be adopted in an application for amendment was laid down by Mohd Azmi FCJ as follow: B

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. C

[6] As a general rule, the court will allow amendments to pleadings at any stage of the proceedings if the proposed amendments are in the interests of justice and for the real issues in dispute between the parties to be identified and to be justify determined. However, the onus is on the applicant to satisfy the court that the three criteria in the established test for amendments enunciated in the *Yamaha Motors* case have been fulfilled. By virtue of O 20 r 5 of the ROC 2012, amendments can be allowed only if they do not occasion any injustice to the opposing party. D E

[7] In this case, the learned sessions court judge allowed the proposed amendments on the grounds that the amount claimed was lesser and thus, benefited the defendants; there was no change in the cause of action; and there was no prejudice to the defendants because of the reduced claim. The SCJ, however, didn't consider the issue of injustice to the defendants occasioned by the 11th hour application just one week before the trial when pleadings had been closed and all bundles of documents for the trial had been finalised and exchanged. F G

[8] The court's direction was for the exchange of documents to be closed on 29 October 2013. In disregard of this direction, the respondent filed the common bundle of documents ('CBOD') only on 29 October 2014 with a further six Additional BOD without the direction or leave of the court or the consent of the appellants. They sought to use the CBOD and the additional BOD filed in breach of the court's direction to apply to amend the SOC on the first day of the trial itself. Inter alia, what they sought to amend were the total claim and the date the cause of action accrued, namely the date of termination of the agreement. There was thus, at this late point and the wee hours, clear uncertainty on the part of the respondent as to the exact amount of claim and the nature of its cause of action. As pointed out by the first appellant, the issue of the date of cause of action is crucial in this case as the alleged cause of action H I

is for implied breach of the franchise agreement and thus the date of termination of the franchise agreement ('FA') is a most material factor to the claim and the defence raised.

[9] It is important to note that the respondent had about 1 ½ years earlier made massive amendments to their pleadings, raising the total claim to RM 729,413, changing the termination date to 31 July 2012 and adding another cause of action. This present application seeks further to add a wholly new and unrelated relief to those in the earlier pleadings, ie, for accounts to be taken. This is manifestly a radical departure from the original character of the suit which was a liquidated claim for a quantified debt only.

[10] In the court's view, the SCJ had failed to adequately consider the element of serious prejudice or injustice caused to the appellants by the 11th hour amendments that could not possibly be compensated by costs when the trial was set to proceed and all documentary evidence required for defence of the claim had been disclosed. He had further failed to seriously consider whether the effect of the amendments would be to change the character of the suit from one to another and inconsistent character as the termination date of the FA was fundamental to the plaintiff's pleaded cause of action. Lastly and more importantly, the SCJ had failed to address the vital issue of bona fide of the application as vital circumstances relating to the application appeared to disclose obvious mala fide on the part of the respondent in moving the court to allow the amendments on vital matters on the day of the trial itself.

[11] While the trial court retains the absolute discretion to allow amendments to pleadings, the discretionary power has to be exercised properly and on correct principles. For the above reasons, as elaborated, I hold that the SCJ had clearly erred in principle in his decision to allow the amendments sought which had the effect of turning the suit from one character to another inconsistent character; were not shown to be made bona fide; and were an abuse of the court process, causing injustice or prejudice to the opposing party that could not be compensated by costs.

[12] The learned SCJ had thus, failed to exercise his discretionary powers correctly on established principles and all relevant considerations. I, accordingly, allowed the appeal and reversed the decision of the SCJ with costs of RM7,000 to the appellants.

Appeal allowed with costs of RM7,000.

Reported by Kohila Nesan